UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Donna Doris Willey

v. Case No. 15-cv-368-JL

Carolyn W. Colvin, Acting Commissioner, Social Security Administration

REPORT AND RECOMMENDATION

Pursuant to 42 U.S.C. § 405(g), Donna Willey moves to reverse the Acting Commissioner's decision to deny her application for Social Security disability insurance benefits, or DIB, under Title II of the Social Security Act, 42 U.S.C. § 423. The Acting Commissioner, in turn, moves for an order affirming her decision. For the reasons that follow, this matter should be remanded to the Acting Commissioner for further proceedings consistent with this report and recommendation.

Standard of Review

The applicable standard of review in this case provides, in pertinent part:

> The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the

> Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . .

42 U.S.C. § 405(g). However, the court "must uphold a denial of social security disability benefits unless 'the [Acting Commissioner] has committed a legal or factual error in evaluating a particular claim.'" Manso-Pizarro v. Sec'y of HHS, 76 F.3d 15, 16 (1st Cir. 1996) (per curiam) (quoting Sullivan v. Hudson, 490 U.S. 877, 885 (1989)).

As for the statutory requirement that the Acting Commissioner's findings of fact be supported by substantial evidence, "[t]he substantial evidence test applies not only to findings of basic evidentiary facts, but also to inferences and conclusions drawn from such facts." Alexandrou v. Sullivan, 764 F. Supp. 916, 917-18 (S.D.N.Y. 1991) (citing Levine v. Gardner, 360 F.2d 727, 730 (2d Cir. 1966)). In turn, "[s]ubstantial evidence is 'more than [a] mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Currier v. Sec'y of HEW, 612 F.2d 594, 597 (1st Cir. 1980) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). But, "[i]t is the responsibility of the [Acting Commissioner] to determine issues of credibility and to draw inferences from the record evidence. Indeed, the

resolution of conflicts in the evidence is for the [Acting Commissioner], not the courts." Irlanda Ortiz v. Sec'y of HHS, 955 F.2d 765, 769 (1st Cir. 1991) (per curiam) (citations omitted). Moreover, the court "must uphold the [Acting Commissioner's] conclusion, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." Tsarelka v. Sec'y of HHS, 842 F.2d 529, 535 (1st Cir. 1988) (per curiam). Finally, when determining whether a decision of the Acting Commissioner is supported by substantial evidence, the court must "review[ ] the evidence in the record as a whole." Irlanda Ortiz, 955 F.2d at 769 (quoting Rodriguez v. Sec'y of HHS, 647 F.2d 218, 222 (1st Cir. 1981)).

Background

The parties have submitted a Joint Statement of Material Facts (doc. no. 15). That statement is part of the court's record and will be summarized here, rather than repeated in full.

Willey left her job as a bar manager in January of 2012, and she applied for DIB about a week later. In addition to working as a bar manager, Willey has also worked as a telemarketer.

In September of 2012, Dr. Gurcharan Singh, a state agency

consultant who did not examine Willey, performed an assessment of her residual functional capacity ("RFC"),[1] based upon a review of her medical records. His Physical RFC Assessment form lists diagnoses of degenerative disc disease of the cervical spine, fibromyalgia, diabetes mellitus, hypothyroidism, and obesity. In his assessment, Dr. Singh opined that Willey could lift and/or carry 20 pounds occasionally and 10 pounds frequently, could stand and/or walk, and could sit, both with normal breaks, for about six hours in an eight-hour workday. In addition, Dr. Singh opined that Willey could: (1) frequently balance, stoop, kneel, and crouch; (2) occasionally climb ramps/stairs and crawl; and (3) never climb ladders/ropes/scaffolds. Dr. Singh also found that Willey was limited to frequent overhead reaching, but had an unlimited capacity for handling, fingering, and feeling.

In October of 2013, Dr. Fereshteh Soumekh, a neurologist who had seen Willey on a bimonthly basis for more than seven years, completed a Musculoskeletal RFC Questionnaire on Willey. Dr. Soumekh began by noting diagnoses of cervical and lumbosacral spondylosis.[2] She then opined that Willey could: (1)

---

[1] "Residual functional capacity" is a term of art that means "the most [a claimant] can still do despite [her] limitations." 20 C.F.R. § 404.1545(a)(1).

[2] Spondylosis is defined as "[a]nkylosis of the vertebra;

sit for 15 minutes at one time, and about four hours in an eight-hour workday (with normal breaks); and (2) stand for five to ten minutes at a time, and about two hours in an eight-hour workday. She further opined that Willey needed to: (1) walk around for two minutes every 15 minutes; (2) shift positions at will from sitting, standing, or walking; (3) lie down every two hours; and (4) elevate her legs three or four times every eight hours. In addition, Dr. Soumekh opined that Willey could: (1) occasionally lift less than ten pounds but never lift more than that; (2) occasionally bend and twist at the waist; (3) use her right hand and arm for grasping, fine manipulation, and reaching about for about 20 percent of an eight-hour workday; and (4) use her left hand and arm to perform those activities for about 50 percent of a workday. Finally, Dr. Soumekh opined that Willey would be absent from work about twice a month as result of her impairments or treatment for them.

After the Social Security Administration denied Willey's claim for DIB, she received a hearing before an Administrative Law Judge ("ALJ"). At the hearing, the ALJ posed two hypothetical questions to a vocational expert ("VE"). This is

---

often applied nonspecifically to any lesion of the spine of a degenerative nature." Stedman's Medical Dictionary 1813 (28th ed. 2006). Ankylosis is the "[s]tiffening or fixation of a joint as the result of a disease process, with fibrous or bony union across the joint; fusion." Id. at 95.

the ALJ's first hypothetical question:

> Q . . . [A]ssume that [Willey] can lift 20 pounds occasionally, 10 pounds frequently, stand or walk for six [hours in an eight-hour workday], sit for six [hours], [has] unlimited use of her hands and feet to operate controls and push and pull. Should never climb ladders, can occasionally climb stairs and crawl, the remaining postural[ ] [capacities] are at frequent. She can frequently reach overhead bilaterally, otherwise unlimited reaching, handling, fingering, and feeling, and should avoid concentrated exposure to extreme cold and hazards. If we assume that as the first hypothetical, do you have an opinion as to whether she could perform her prior work?

Administrative Transcript (hereinafter "Tr.") 228-29. The VE testified that a person with the RFC described by the ALJ could perform Willey's past relevant work as a telemarketer and as a bar manager. The ALJ's examination of the VE continued:

> Q . . . I'd like you to assume she can occasionally lift less than 10 pounds, can sit for 15 minutes at a time, stand for five minutes at a time, during an eight-hour workday can stand or walk for two hours, sit for four, and would need to walk for two minutes every 15 minutes, would need to shift positions at will, would need to lie down every two hours, would need to elevate her legs 20 degrees three to four times [a day], and can use her right upper extremity 20 percent of the time and her left 50 percent of the time, and can occasionally bend and twist at the waist. If we assume that as the second hypothetical, do you have an opinion as to whether she could perform any of her prior work?
>
> A In my opinion, she would not, your honor, and I would say that it is based on the requirement of laying down every two hours.
>
> Q So, would there be any jobs that she could do, assuming the second hypothetical?

A Not in my opinion.

Tr. 229-30.

After Willey's hearing, the ALJ issued a decision that includes the following relevant findings of fact and conclusions of law:

> 5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) except she should never climb ladders. The claimant can occasionally climb stairs and crawl, but can perform the remaining postural activities frequently. She can frequently reach overhead bilaterally, and should avoid concentrated exposure to extreme cold and hazards.
>
> . . . .
>
> 6. The claimant is capable of performing past relevant work as a telemarketer and bar manager. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565).

Tr. 193, 197.

Discussion

A. The Legal Framework

To be eligible for disability insurance benefits, a person must: (1) be insured for such benefits; (2) not have reached retirement age; (3) have filed an application; and (4) be under a disability. 42 U.S.C. §§ 423(a)(1)(A)-(D). The only question in this case is whether Willey was under a disability from

January 26, 2012, through February 14, 2014.

To decide whether a claimant is disabled for the purpose of determining eligibility for disability insurance benefits, an ALJ is required to employ a five-step process. See 20 C.F.R. § 404.1520.

> The steps are: 1) if the [claimant] is engaged in substantial gainful work activity, the application is denied; 2) if the [claimant] does not have, or has not had within the relevant time period, a severe impairment or combination of impairments, the application is denied; 3) if the impairment meets the conditions for one of the "listed" impairments in the Social Security regulations, then the application is granted; 4) if the [claimant's] "residual functional capacity" is such that he or she can still perform past relevant work, then the application is denied; 5) if the [claimant], given his or her residual functional capacity, education, work experience, and age, is unable to do any other work, the application is granted.

Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001) (citing 20 C.F.R. § 416.920, which outlines the same five-step process as the one prescribed in 20 C.F.R. § 404.1520).

The claimant bears the burden of proving that she is disabled. See Bowen v. Yuckert, 482 U.S. 137, 146 (1987). She must do so by a preponderance of the evidence. See Mandziej v. Chater, 944 F. Supp. 121, 129 (D.N.H. 1996) (citing Paone v. Schweiker, 530 F. Supp. 808, 810-11 (D. Mass. 1982)). Finally,

> [i]n assessing a disability claim, the [Acting Commissioner] considers objective and subjective factors, including: (1) objective medical facts; (2) [claimant]'s subjective claims of pain and disability

> as supported by the testimony of the claimant or other witness; and (3) the [claimant]'s educational background, age, and work experience.

Mandziej, 944 F. Supp. at 129 (citing Avery v. Sec'y of HHS, 797 F.2d 19, 23 (1st Cir. 1986); Goodermote v. Sec'y of HHS, 690 F.2d 5, 6 (1st Cir. 1982)

B. Willey's Claims

Willey claims that the ALJ erred in assessing her RFC because he did not properly: (1) weigh Dr. Soumekh's opinions; and (2) evaluate her credibility. Willey's first claim is persuasive, and dispositive.

Under the regulations that govern the evaluation of claims for DIB, the opinions of acceptable medical sources who have treated a claimant are generally entitled to substantial weight. Those regulations provide:

> Generally, we give more weight to opinions from [a claimant's] treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of [a claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [a claimant's] case record, we will give it controlling weight.

20 C.F.R. § 404.1527(c)(2). When an ALJ does not give

controlling weight to the opinion of a treating source, he must determine how much weight to give it by applying the following factors: (1) the length of the claimant's treatment relationship and the frequency of examination; (2) the nature and the extent of the treatment relationship; (3) the supportability of the opinion; (4) the consistency of the opinion with the record as a whole; (5) the specialization of the source who gave the opinion; and (6) other factors.[3] See 20 C.F.R. §§ 404.1527(c)(2)-(6). Moreover, "[i]n many cases, a treating source's opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight." Social Security Ruling 96-2p, 1996 WL 374188, at *4 (S.S.A. July 2, 1996). In any event, the ALJ must "always give good reasons . . . for the weight [he] give[s] [a claimant's] treating source's opinion." 20 C.F.R. § 404.1527(c)(2).

In his decision, the ALJ had this to say about Dr. Soumekh's opinions:

> Finally, in October of 2013, the claimant's treating physician, Dr. Soumekh opined that the claimant could sit for about 4 hours and stand or walk for about two hours during an 8-hour workday. He opined that the

[3] As examples of "other factors," the regulations identify: (1) the source's understanding of the SSA's disability programs and evidentiary requirements; and (2) "the extent to which [the] acceptable medical source is familiar with the other information in [a claimant's] case record." 20 C.F.R. § 404.1527(c)(6).

> claimant could occasionally lift less than 10 pounds, and use her right hands [sic] and arms [sic] only 20 percent of the workday. He added that she could use her left hand and arm only 50 percent of the workday, and was expected to be absent from work about twice per month. The opinions of Dr. Soumekh are given little weight, as they are not supported by the totality of the evidence on record. During the period, the claimant made little to no complaints of limitations in her hands, and made absolutely no mention of hand impairments at the hearing. Further, her reported daily activities indicate that she would be able to tolerate at least light lifting and light exertion sitting and standing requirements. Such abilities are also supported by the objective findings during the period, including normal gait, good strength, and good range of motion. As such, the opinions of Dr. Singh are given more weight, as they are more consistent with the evidence on record as a whole.

Tr. 196 (citation to the record omitted).

The most glaring problem with the ALJ's consideration of Dr. Soumekh's opinions is that he did not mention Dr. Soumekh's opinion that Willey needed to lie down every two hours. See Tr. 959. In her testimony at Willey's hearing, the VE identified that particular limitation as precluding Willey from performing any job. Yet, while he discussed Dr. Soumekh's limitations on Willey's capacity for using her fingers and hands, and her capacities for lifting, sitting, and standing, the ALJ said nothing about Dr. Soumekh's opinion that Willey needed to lie down every two hours. Necessarily, he did not give any reason, much less a good reason, for discounting that opinion. Given the centrality of that opinion to the VE's testimony, and the

ALJ's obligation to "evaluate every medical opinion," 20 C.F.R. § 404.1527(c), the ALJ's failure to evaluate Dr. Soumekh's opinion on Willey's need to lie down every two hours is an error that requires this matter to be remanded.

Remand will also give the ALJ an opportunity to revisit the reasons he did give for discounting several of Dr. Soumekh's other opinions, as those explanations do not appear to qualify as good reasons. With respect to what qualifies as a good reason,

> the notice of the . . . decision must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight.

Id. (emphasis added). The ALJ's explanations in this case fall short of that standard.

When addressing the factor of consistency with the record as a whole,[4] see 20 C.F.R. § 404.1527(c)(4), the ALJ stated that Willey's "reported daily activities indicate that she would be able to tolerate at least light lifting and light exertion sitting and standing requirements." Tr. 196. But, the ALJ did

[4] There are hints that the ALJ might also have considered the factor of supportability, see 20 C.F.R. § 404.1527(c)(3), but a close reading of the ALJ's decision reveals that he limited his analysis to consistency.

not point to any specific daily activities that demonstrate Willey's capacity to meet those exertional requirements. And he did not specifically identify any evidence in the case record that supports his assertion. Thus, while he focused on a relevant factor, the ALJ did not give a good reason, i.e., one that is adequately specific and supported, for his determination that Dr. Soumekh's opinions on Willey's capacities for lifting, sitting, and standing were inconsistent with the record as a whole.

The ALJ also stated that Willey's capacities for light lifting and light-exertion sitting and standing were "supported by the objective findings during the period, including normal gait, good strength, and good range of motion." Tr. 196. But the ALJ did not explain how normal gait, good strength, and good range of motion translate into a capacity for "light lifting and light exertion sitting and standing." Id. And had the ALJ attempted such an explanation, he would have run the risk of impermissibly "interpret[ing] raw medical data in functional terms." Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam) (citations omitted). Moreover, while the ALJ referred generally to "the objective findings during the period," id., he did not specifically identify evidence in the case record that supports his assertion. So, as with the ALJ's determination

that Dr. Soumekh's opinions were inconsistent with the evidence of Willey's daily activities, his determination that those opinions were inconsistent with the medical evidence, as that determination is expressed in his decision, does not appear to be a good reason for discounting Dr. Soumekh's opinions.

In sum, because Dr. Soumekh was a treating source, his opinions are presumptively entitled to controlling weight. That presumption is rebuttable, see Berrios Lopez v. Sec'y of HHS, 951 F.2d 427, 431 (1st Cir. 1991) (per curiam), but here, the ALJ did not even evaluate Dr. Soumekh's most important opinion and did not give good reasons for discounting several of his other opinions. Remand is required.

Conclusion

For the reasons given, the Acting Commissioner's motion for an order affirming her decision (doc. no. 11) should be denied, and Willey's motion to reverse that decision (doc. no. 10) should be granted to the extent that the case is remanded to the Acting Commissioner for further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g).

Any objection to this Report and Recommendation must be filed within 14 days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file an objection within the

specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).

Andrea K. Johnstone
United States Magistrate Judge

April 7, 2016

cc: Raymond Kelly, Esq.
Terry Ollila, Esq.